
Volume 78
Issue 1 *Dickinson Law Review - Volume 78,*
1973-1974

10-1-1973

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Recommended Citation

Charles W. Watson, *Justifiable Use of Deadly Force in Law Enforcement*, 78 DICK. L. REV. 115 (1973).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol78/iss1/5>

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JUSTIFIABLE USE OF DEADLY FORCE IN LAW ENFORCEMENT

INTRODUCTION

Pennsylvania's recently enacted Crimes Code,¹ codifies the previous law governing the justifiable use of force in law enforcement. Although patterned after the Model Penal Code,² the new Pennsylvania statute differs from it in several respects. Additionally, the Crimes Code significantly alters existing law concerning the justifiable use of deadly force in law enforcement. The author will compare the defense of justification in the context of deadly force used in law enforcement as it existed in Pennsylvania, and as it is embodied in the Model Penal Code, with the new rules codified in the Crimes Code. Specific subjects and their order of discussion are the justifiable use of deadly force in (I) effecting an arrest, which includes consideration of (A) necessity, (B) fresh pursuit, (C) notice, (D) type of felony and (E) felony in fact standard; (II) prevention of escape; and (III) prevention of the commission of crime which includes consideration of (A) necessity, (B) type of felony, and (C) suppression of a riot.

I. EFFECTING AN ARREST

A. Necessity

An obvious requirement for the justifiable use of deadly force in effecting an arrest is that the actor must believe the deadly force is necessary to effect the arrest. This requirement is contained in case law, the Model Penal Code, and the Crimes Code. In *Commonwealth v. Long*³ the court held that deadly force may be used to effect an arrest only if the felon sought to be apprehended cannot otherwise be taken. The Pennsylvania Supreme Court has said that in effecting an arrest the justifiable use of deadly force "grows out of the necessity of the case."⁴ The Model Penal Code provides that deadly force is justifiable in effecting an arrest only when the actor "believes that such force is immediately necessary to effect a lawful arrest."⁵ The Crimes Code re-

1. PA. STAT. ANN. tit. 18, § 508 (Supp. 1973).

2. MODEL PENAL CODE § 3.07 (Proposed Off. Draft, 1962).

3. 17 Pa. Super. 641, 648 (1901).

4. *Commonwealth v. Loughhead*, 218 Pa. 429, 430, 67 A. 747, 748 (1907).

5. Subject to the provisions of this Section and of Section 3.09, the

quires that the actor must believe that the deadly force is "necessary to prevent the arrest from being defeated"⁸

B. *Fresh Pursuit*

According to the courts the actor must be in fresh pursuit of the felon before he may justifiably use deadly force to subdue him.⁷ The fresh pursuit refers to the actor's immediate attempts to consummate his initial effort of effecting the arrest, rather than immediate pursuit of the criminal after the commission of the crime.⁸ Although many of the cases in which the requirement of fresh pursuit is discussed involve arrests by private individuals not assisting a policeman, the opinions do not limit the requirement to such individuals.⁹ Without discussing the requirement, the court in *Commonwealth v. Duerr*¹⁰ noted that the defendant, a police officer, was in "hot pursuit"¹¹ of the deceased in its consideration of the officer's defense of justifiable homicide. The court's requirement of fresh pursuit is apparently closely related to the requirement that the deadly force must be necessary to effect the arrest. Fresh pursuit may be interpreted as a requirement that the actor in using the deadly force is reacting immediately to the criminal's attempt to defeat the arrest. If there is delay between the time the arrest is initially attempted and when the deadly force is used the necessity of the force is not established.

use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest. MODEL PENAL CODE § 3.07(1) (Proposed Off. Draft, 1962).

6. A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that: (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay. PA. STAT. ANN. tit. 18, § 508(a)(1) (Supp. 1973).

7. *Commonwealth v. Allen*, 443 Pa. 15, 19, 276 A.2d 539, 542 (1971); *Commonwealth v. Chermansky*, 430 Pa. 170, 173, 242 A.2d 237, 240 (1968).

8. See, e.g., *Commonwealth v. Grether*, 204 Pa. 203, 205, 53 A. 753, 753 (1902) (the court found fresh pursuit by the person attempting the arrest when he tried to subdue the criminal the day after the crime had been committed).

9. *Commonwealth v. Allen*, 443 Pa. 15, 19, 276 A.2d 539, 542 (1971); *Commonwealth v. Chermansky*, 430 Pa. 170, 173, 242 A.2d 237, 240 (1968); *Commonwealth v. Grether*, 204 Pa. 203, 205, 53 A. 753, 753 (1902); *Brooks v. Commonwealth*, 61 Pa. 352, 359 (1869).

10. 158 Pa. Super. 484, 45 A.2d 235 (1946).

11. *Id.* at 488, 45 A.2d at 237.

Such a delay logically would require another attempt at arrest to establish the reasonable belief in the necessity of the force. The Model Penal Code does not specifically require fresh pursuit as a prerequisite to the use of deadly force in effecting an arrest, but does require that the actor believe the force is immediately necessary to effect the arrest.¹² This requirement of belief in immediate necessity is the equivalent of the case law's prerequisite of fresh pursuit in that both the courts and the Model Penal Code require that the deadly force be used as an immediate response to the criminal's attempt to defeat the arrest. The Crimes Code, like the Model Penal Code, does not specifically require fresh pursuit. The Crimes Code states only that the actor must believe that the deadly force is necessary.¹³ The Crimes Code's prerequisite of belief in necessity rather than immediate necessity, however, apparently does not abolish the requirement of fresh pursuit. In place of the Model Penal Code requirement that the actor believe that the deadly force is immediately necessary, the Crimes Code requires the actor to believe that the force is "necessary to prevent the arrest from being defeated by resistance or escape."¹⁴ Since in effect the Crimes Code states that the actor may use deadly force to effect an arrest only when he reasonably¹⁵ believes that the arrest will be defeated by the resistance or escape of the criminal, the immediate response requirement of the case law and the Model Penal Code is embodied in the Crimes Code. If an initial attempt at arrest is defeated by resistance or escape the attempt of a second arrest would be necessary to establish the reasonable belief that deadly force is required to subdue the person sought to be arrested. The fact that the person sought to be arrested successfully avoided an effort to arrest him is not sufficient to justify a reasonable belief that he will again avoid arrest if deadly force is not used to subdue him.

C. Notice

According to the case law the actor in certain situations must give notice of his purpose for arrest before deadly force may justifiably be used.¹⁶ The courts have differentiated between police-

12. See MODEL PENAL CODE §3.07(1) (Proposed Off. Draft, 1962).

13. See PA. STAT. ANN. tit. 18, § 508(a)(1)(i) (Supp. 1973).

14. *Id.*

15. When used in the Crimes Code the terms "believes" or "belief" mean "reasonably believes" or "reasonable belief." PA. STAT. ANN. tit. 18, § 501 (Supp. 1973).

16. *Brooks v. Commonwealth*, 61 Pa. 352, 359 (1869).

men and private persons attempting an arrest in regard to the requirement of notice to the person sought to be arrested. The courts require that private persons, not assisting a policeman at his request, inform the person whom they are seeking to arrest of their purpose before using the deadly force.¹⁷ An exception to this general requirement is permitted when the surrounding circumstances are sufficient to warn the person sought to be arrested of the actor's purpose.¹⁸ Thus, to sustain a defense of justification the courts have required that the person at whom the deadly force was directed must have known of the private person's purpose of arrest. In the case of police officers and those summoned to their aid,¹⁹ the courts have indicated that notice of the officer's legal qualification and intent to make an arrest is not necessary.²⁰ The courts have, however, noted that although they do not require a policeman to give such notice, it would be prudent for the officer to give the notice whenever possible.²¹ This view was adopted by the Pennsylvania Supreme Court in *Shovlin v. Commonwealth*²² where the court stated that "While in most cases it may be prudent for the officer to give the notice before making the arrest, it is going too far to say . . . that he is required to do so" ²³

The Model Penal Code provides that before the use of deadly force is justified the person seeking to effect the arrest must make the purpose of the arrest known to the person sought to be arrested unless the actor believes that the purpose is "otherwise known by or cannot reasonably be made known to the person to be arrested."²⁴ The Model Penal Code limits the use of deadly

17. *Commonwealth v. Allen*, 443 Pa. 15, 19, 276 A.2d 539, 542 (1971); *Commonwealth v. Chermansky*, 430 Pa. 170, 173, 242 A.2d 237, 240 (1968); *Brooks v. Commonwealth*, 61 Pa. 352, 359 (1869).

18. *Commonwealth v. Allen*, 443 Pa. 15, 19, 276 A.2d 539, 542 (1971); *Commonwealth v. Chermansky*, 430 Pa. 170, 173, 242 A.2d 237, 240 (1968); *Commonwealth v. Long*, 17 Pa. Super. 641, 648 (1901).

19. Every person who assists an officer in making an arrest, at his request, has the same protection that is accorded the officer himself, and acting in such capacity, he may resort to the same measures to secure the arrest of the accused.

Commonwealth v. Fields, 120 Pa. Super. 397, 401, 183 A. 78, 80 (1936).

20. *Commonwealth v. Negri*, 414 Pa. 21, 32, 198 A.2d 595, 602 (1964); *Shovlin v. Commonwealth*, 106 Pa. 369, 372 (1884); *Commonwealth v. Duerr*, 158 Pa. Super. 484, 491, 45 A.2d 235, 238 (1946); *Commonwealth v. Long*, 17 Pa. Super. 641, 648 (1901).

21. *Shovlin v. Commonwealth*, 106 Pa. 369, 372 (1884); *Commonwealth v. Duerr*, 158 Pa. Super. 484, 491, 45 A.2d 235, 238 (1946); *Commonwealth v. Long*, 17 Pa. Super. 641, 648 (1901); 3 PA. LAW ENCY. Arrest § 4 (1957).

22. 106 Pa. 369 (1884).

23. *Id.* at 372.

24. (a) The use of force is not justifiable under this section unless: (i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and (ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid. (b) The use of deadly force is not justifiable under this section unless: (i) the arrest is for a

force to effect an arrest to a police officer or a private person summoned to his assistance.²⁵ The Model Penal Code, therefore, in the context of notice to the person sought to be arrested, requires policemen and their summoned private assistants to conform with requirements similar to those applied by the Pennsylvania courts to private persons not summoned by police who attempt to effect an arrest.

The Crimes Code makes no mention of the requirement of notice as a prerequisite to the use of deadly force to effect an arrest. Like the Model Penal Code, the Crimes Code limits the use of deadly force to effect an arrest to policemen and private persons summoned by policemen.²⁶ Since Pennsylvania case law holds that a policeman or his summoned private assistant is not required to give the person sought to be arrested notice of the purpose of the arrest or of the legal authority of the officer,²⁷ the Crimes Code is consistent in this respect with existing case law. The Crimes Code, however, does not reflect the courts' view that the prudent officer would give the notice whenever possible.²⁸ It is submitted that the position of the Model Penal Code, requiring a policeman to give notice unless he believes the surrounding circumstances are such that the person sought to be arrested knows of the actor's purpose or that the notice cannot reasonably be given,²⁹ is a better approach to the notice requirement. This view does not go so far as to require the policeman to give the notice in all situations, but does require the notice whenever it reasonably can be given. Inclusion in the Crimes Code of the Model Penal Code language would have resulted in a requirement consistent with existing Pennsylvania case law. Such language would not have required the notice in all cases but would have given statutory expression of the courts' repeated opinion that prudent practice would require giving the notice whenever possible.³⁰

felony; and (ii) the person effecting the arrest is authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that: (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed. MODEL PENAL CODE § 3.07 (2) (Proposed Off. Draft, 1962).

25. *Id.*

26. See PA. STAT. ANN. tit. 18, § 508(a)(1) (Supp. 1973).

27. See note 20 and accompanying text *supra*.

28. See cases cited note 21 *supra*.

29. See MODEL PENAL CODE § 3.07(2)(a)(i) (Proposed Off. Draft, 1962).

30. See cases cited note 21 *supra*.

D. Type of Felony

Before deadly force may justifiably be used to effect an arrest case law requires that a felony must have been committed.³¹ At common law the commission of any felony was sufficient to justify the deadly force whether the actor was a police officer³² or an independently acting private person.³³ In *Commonwealth v. Duerr*³⁴ the court cited the *Restatement of Torts*³⁵ which limits the use of deadly force in effecting an arrest to only the more dangerous felonies. Neither *Duerr*, nor subsequent Pennsylvania cases, however, adopted the view of the *Restatement* where the person seeking to make the arrest was a policeman or his summoned assistant.³⁶ The *Restatement (Second) of Torts*³⁷ changed the original *Restatement* and now states that any felony is enough to sustain the justifiable use of deadly force. The Reporter's comments to the *Restatement (Second) of Torts* explain that although the former view may be more desirable, the rule nevertheless was changed to extend the right to any felony since no court had followed the view of the first *Restatement*.³⁸ Pennsylvania courts initially made no distinction regarding the type of felony regardless of who was attempting the arrest. They later restricted the right of a private person, acting without a request from a police-

31. *Brooks v. Commonwealth*, 61 Pa. 352, 359 (1869); *Commonwealth v. Duerr*, 158 Pa. Super. 484, 492, 45 A.2d 235, 239 (1946); *Commonwealth v. Thompson*, 26 Del. 510, 511 (Pa. C.P. 1937); *Commonwealth v. Greer*, 20 Pa. C.C. 535, 536 (Pa. 1898).

32. *Commonwealth v. Duerr*, 158 Pa. Super. 484, 492, 45 A.2d 233, 239 (1946); *Commonwealth v. Thompson*, 26 Del. 510, 511 (Pa. C.P. 1937); *Commonwealth v. Greer*, 20 Pa. C.C. 535, 536 (Pa. 1898).

33. *Commonwealth v. Grether*, 204 Pa. 203, 205, 53 A. 753, 753 (1902); *Brooks v. Commonwealth*, 61 Pa. 352, 358 (1869); *Commonwealth v. Long*, 17 Pa. Super. 641, 643 (1901).

34. 158 Pa. Super. 484, 493, 45 A.2d 235 (1946).

35. The use of force against another for the purpose of effecting an arrest of the other by means intended or likely to cause death is privileged if (a) the arrest is made for treason or for a felony which normally causes or threatens death or serious bodily harm, or which involves the breaking and entry of a dwelling place, and (b) the actor reasonably believes that the arrest cannot otherwise be effected. *RESTATEMENT OF TORTS* § 131 (1934).

36. *Commonwealth v. Allen*, 443 Pa. 15, 19, 276 A.2d 539, 542 (1971); *Commonwealth v. Chermansky*, 430 Pa. 170, 174, 242 A.2d 237, 240 (1968); 94 U. PA. L. REV. 327 (1946).

37. The actor's use of force against another, for the purpose of effecting a privileged arrest of the other, by means intended or likely to cause death is privileged if (a) the arrest is made under a warrant which charges the person named in it with the commission of treason or a felony, or if the arrest is made without a warrant for treason or for a felony which has been committed, and (b) the other is the person named in the warrant if the arrest is under a warrant, or the actor reasonably believes the offense was committed by the other if the arrest is made without a warrant, and (c) the actor reasonably believes that the arrest cannot otherwise be effected. *RESTATEMENT (SECOND) OF TORTS* § 131 (1965).

38. *RESTATEMENT (SECOND) OF TORTS*, Appendix, Reporter's Notes at 140 (1966).

man, to use deadly force to effect an arrest only when certain felonies had in fact been committed. In *Commonwealth v. Chermansky*³⁹ the Supreme Court of Pennsylvania said that after May 21, 1968, a private person is justified in using deadly force to effect the arrest of a felon only when the felony committed was either "treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, common law burglary, kidnapping, assault with intent to murder, rape or rob, or a felony which normally causes or threatens death or great bodily harm."⁴⁰ The Pennsylvania Supreme Court, therefore, adopted the view of the original *Restatement of Torts* when the actor was a private person not summoned by the police. Since *Chermansky* and subsequent opinions⁴¹ were limited to private individuals, however, the old rule that any felony is enough to sustain the justification was retained for policemen and private individuals acting at their request.

The Model Penal Code states that deadly force may be used to effect an arrest when the arrest is for a felony and the actor believes that such felony included the use or threatened use of deadly force.⁴² Since the Model Penal Code does not permit a private person acting independently to use deadly force to effect an arrest,⁴³ the standard applies only to policemen and their summoned private assistants. The Model Penal Code essentially adopts the reasoning of the original *Restatement of Torts* and limits the use of deadly force to effect an arrest to only serious felonies. In effect then, the Model Penal Code limits the use of deadly force to only a certain type of felony, and then defines the type felony included—one which the actor believes involves the use or threatened use of deadly force.

The Crimes Code incorporates the limitation that the deadly force may be used only in the case of certain felonies.⁴⁴ The existing case law rule that a policeman or a private person summoned by him may use deadly force in an arrest for any felony⁴⁵ is therefore overruled by the Crimes Code. The Code provides that the officer or his summoned assistant may use deadly force only when he believes that a "forcible felony" has been committed or attempted.⁴⁶ This provision of the Crimes Code is consistent with

39. 430 Pa. 170, 242 A.2d 237 (1968).

40. *Id.* at 174, 242 A.2d at 240.

41. *Commonwealth v. Allen*, 443 Pa. 15, 19, 276 A.2d 539, 542 (1971).

42. MODEL PENAL CODE § 3.07(2)(b)(iv)(1) (Proposed Off. Draft, 1962).

43. MODEL PENAL CODE § 3.07(2)(b)(ii) (Proposed Off. Draft, 1962).

44. PA. STAT. ANN. tit. 18, § 508(a)(i)(ii) (Supp. 1973).

45. See note 32 and accompanying text *supra*.

46. PA. STAT. ANN. tit. 18, § 508(a)(i)(ii) (Supp. 1973).

the Model Penal Code in that only a certain type of felony gives rise to the justifiable use of deadly force in the arrest for the crime. Unlike the Model Penal Code, however, the Crimes Code does not adequately define the type of felony intended to support the justification. At least four interpretations of the term seem possible. At the one extreme is the view that any felony which involves the use or attempted use of any force whatsoever is sufficient to justify the deadly force in effecting the arrest. At the other extreme is the standard provided by the Model Penal Code which states that only felonies which involve the use or threatened use of deadly force⁴⁷ are included in the classification. Somewhere in between these two possibilities is the list of felonies which the Pennsylvania Supreme Court has designated as sufficient to support the justification if the person attempting the arrest is an independently acting private individual.⁴⁸ This list includes treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, common law burglary, kidnapping, assault with intent to murder, rape, or rob, or a felony which normally causes or threatens death or great bodily harm.⁴⁹ Finally the term could be interpreted as referring to that type of felony which the courts have found necessary to support the use of deadly force in the prevention of crime. The courts have referred to this class of crimes as "atrocious felonies attempted by force or surprise."⁵⁰ This classification has been held to include such felonies as sodomy attempted by force.⁵¹

Although the term forcible felony logically could be defined as referring to any of the above-mentioned types of felony, it is probable that the term as used in the Crimes Code refers to any felony which involves the use of any force, whether or not the force is likely to cause death or serious injury. This interpretation requires the least deviation from the existing case law rule that any felony will support the justification.⁵² If the drafters of the Crimes Code had intended to limit the justifiable use of deadly force in effecting an arrest to only those felonies which involve the use or threatened use of deadly force, it seem logical that they would have adopted the language of the Model Penal Code.⁵³ Finally, if the drafters had intended the justification to extend to only

47. MODEL PENAL CODE § 3.07(2)(b)(iv)(1) (Proposed Off. Draft, 1962).

48. See notes 39-41 and accompanying text *supra*.

49. Commonwealth v. Allen, 443 Pa. 15, 20, 276 A.2d 539, 542 (1971); Commonwealth v. Chermansky, 430 Pa. 170, 174, 242 A.2d 237, 240 (1968).

50. Commonwealth v. Harris, 444 Pa. 515, 518, 281 A.2d 879, 881 (1971); Commonwealth v. Emmons, 157 Pa. Super. 495, 499, 43 A.2d 568, 569 (1945); Commonwealth v. Keith, 46 Berks Co. 137, 140 (Pa. C.P. 1954).

51. Commonwealth v. Lawrence, 428 Pa. 188, 192, 236 A.2d 768, 771 (1968).

52. See notes 30-33 and accompanying text *supra*.

53. MODEL PENAL CODE § 3.07(2)(b)(iv)(1) (Proposed Off. Draft, 1962).

a specific list of felonies or "atrocious felonies attempted by force or surprise" it seems equally logical that they would have either included the list in the statute or termed the type crime intended an "atrocious felony of force or surprise" rather than "forcible felony."

E. *Felony in Fact Standard*

Pennsylvania case law requires that a felony in fact must have been committed before a person may justifiably use deadly force to effect the arrest of the felon.⁵⁴ The courts are clear on this point; a reasonable belief that a felony was committed is not enough to justify deadly force.⁵⁵ Either a policeman⁵⁶ or a private person⁵⁷ may arrest a person on suspicion of felony but deadly force may not be used on mere suspicion. The decisions indicate that any party, whether a policeman or a private person acting independently, acts "at his peril"⁵⁸ when he uses deadly force to effect an arrest on suspicion that a felony has been committed. If the person seeking to make the arrest reasonably believes that a felony has been committed when in fact the crime was only a misdemeanor, deadly force used to effect the arrest is not justified.⁵⁹ This "in fact" standard applies not only to the crime but also to the suspected felon at whom the deadly force was directed.⁶⁰ In other words, the person sought to be arrested must in fact have been the person who committed the felony. A reasonable belief that the person killed was the perpetrator of the felony will not support the justification.⁶¹

The Model Penal Code apparently retains the "in fact" standard since it provides that deadly force is not justifiable in effect-

54. *Brooks v. Commonwealth*, 61 Pa. 352, 358 (1869); *Commonwealth v. Duerr*, 158 Pa. Super. 484, 492, 45 A.2d 235, 239 (1946); *Commonwealth v. Thompson*, 26 Del. 510, 511 (Pa. C.P. 1937); *Commonwealth v. Greer*, 20 Pa. C.C. 535, 536 (Pa. 1898).

55. *Commonwealth v. Duerr*, 158 Pa. Super. 484, 492, 45 A.2d 235, 239 (1946).

56. *Id.*

57. *Commonwealth v. Chermansky*, 430 Pa. 170, 174, 242 A.2d 237, 240 (1968); *Brooks v. Commonwealth*, 61 Pa. 352, 358 (1869); *Commonwealth v. Thompson*, 26 Del. 510, 511 (Pa. C.P. 1937).

58. *Commonwealth v. Chermansky*, 430 Pa. 170, 174, 242 A.2d 237, 240 (1968); *Commonwealth v. Duerr*, 158 Pa. Super. 484, 492, 45 A.2d 235, 239 (1946).

59. *Commonwealth v. Duerr*, 158 Pa. Super. 484, 492, 45 A.2d 235, 239 (1946).

60. *Id.*; *Commonwealth v. Chermansky*, 430 Pa. 170, 174, 242 A.2d 237, 240 (1968).

61. *Id.*

ing an arrest unless the arrest is for a felony.⁶² As previously stated, the Model Penal Code limits the use of deadly force to only those felonies which the actor *believes* "involved conduct including the use or threatened use of deadly force."⁶³ The Model Penal Code, then, limits the use of deadly force in effecting an arrest to those situations where a felony has in fact been committed and the actor believes that the felony involved the use or threatened use of deadly force.

The Crimes Code differs significantly from both the case law and the Model Penal Code in its treatment of the "in fact" standard. It provides that a police officer or his summoned private assistant may use deadly force to effect the arrest when he believes that "the person to be arrested has committed or attempted a forcible felony" ⁶⁴ This provision reverses the case law rule that a felony in fact is required and that a reasonable belief is not enough to justify the deadly force.⁶⁵ That this reversal of existing law was intended by the drafters of the Crimes Code is indicated by the comments which support the statute.⁶⁶ The statutory language extends the reasonable belief standard to the question of the identity of the person at whom the deadly force is directed since the Crimes Code requires that the actor need only reasonably believe that the person sought to be arrested committed the forcible felony. This also reverses existing case law which provides that the person sought to be arrested must in fact have been the person who committed the felony.⁶⁷

Although the Crimes Code and the Model Penal Code differ the former employing an "in fact" standard, the latter a "reasonable belief" standard in determining whether a felony has been committed by the person at whom the deadly force was directed, the codes are consistent in providing that the actor need only believe that the felony was of the type stipulated by the respective statutes. The Model Penal Code requires that the actor believe that the felony committed "involved conduct including the use or threatened use of deadly force"⁶⁸ while the Crimes Code requires that the actor believe that a "forcible felony"⁶⁹ has been committed or attempted.

The replacement of the existing Pennsylvania in fact standard with the reasonable belief standard significantly enlarges the scope of the justification defense in cases where deadly force is used by a

62. MODEL PENAL CODE § 3.07(2)(b)(i) (Proposed Off. Draft, 1962).

63. MODEL PENAL CODE § 3.07(2)(b)(iv)(1) (Proposed Off. Draft, 1962).

64. PA. STAT. ANN. tit. 18, § 508(a)(1)(ii) (Supp. 1973).

65. See notes 54-58 and accompanying text *supra*.

66. PA. STAT. ANN. tit. 18, § 508, Drafter's Comments, 9.

67. See notes 60 and 61 and accompanying text *supra*.

68. MODEL PENAL CODE § 3.07(2)(b)(iv)(1) (Proposed Off. Draft, 1962).

69. PA. STAT. ANN. tit. 18, § 508(a)(1)(ii) (Supp. 1973).

policeman or his summoned private assistant in effecting an arrest. In the use of such force by an independently acting private individual, however, the application of the justification defense in this context is narrower than the existing case law rule. The Crimes Code provides that a private individual, not summoned by a policeman, may not use deadly force to effect an arrest unless he "believes that such force is necessary to prevent death or serious bodily injury to himself or another."⁷⁰ Like the Model Penal Code,⁷¹ therefore, the Crimes Code does not extend the defense of justification to an independently acting private individual attempting to effect an arrest. The Crimes Code retains the case law rule that permits a private person, not summoned by a policeman, to arrest a person he believes has committed a crime,⁷² but unlike the case law does not in any case except self defense or defense of another, permit the individual to follow through with deadly force to complete the arrest. If the person sought to be arrested defeats the arrest with acts that do not endanger the actor or another, such as flight, the private individual must stop short of deadly force in affecting the arrest. Since existing case law permits an independently acting private individual to effect an arrest with deadly force under certain circumstances,⁷³ the Crimes Code has in this context narrowed the existing rule as to when such force is justified in effecting an arrest.

II. PREVENTION OF ESCAPE

Although both the Model Penal Code⁷⁴ and the Crimes Code⁷⁵ have separate sections concerning the justifiable use of force in

70. A private person who makes, or assists another private person in making a lawful arrest is justified in the use of any force which he would be justified in using if he were summoned or directed by a peace officer to make such arrest, except that he is justified in the use of deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or another. PA. STAT. ANN. tit. 18, § 508(b)(1) (Supp. 1973).

71. MODEL PENAL CODE § 3.07(2)(b)(ii) (Proposed Off. Draft, 1962).

72. PA. STAT. ANN. tit. 18, § 508(b)(1) (Supp. 1973).

73. See notes 39-41 and accompanying text *supra*.

74. The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime. MODEL PENAL CODE § 3.07(3) (Proposed Off. Draft, 1962).

75. (1) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape

preventing the escape of a person who has been arrested, the case law rules of justification are the same for the use of deadly force in effecting an arrest and in preventing an escape from custody. The general rule is that either a policeman⁷⁶ or a private individual⁷⁷ may use deadly force to prevent the escape of a felon but not of a misdemeanant. The courts have rationalized this distinction by recognizing that "[t]he security of person and property is not endangered by a petty offender (misdemeanant) being at large, as in the case of a felon" ⁷⁸ The previous discussion of the case law requirements of necessity, fresh pursuit, type of felony, and in fact standard are equally relevant in determining the justification of deadly force used to prevent the escape from custody of a person who has been arrested.

With one exception the Model Penal Code⁷⁹ and the Crimes Code⁸⁰ provide that a person attempting to prevent the escape of an arrested person may use deadly force to prevent the escape only if the deadly force would have been justified in effecting the arrest. These provisions are consistent with the case law approach of making no distinction between efforts to effect an arrest and prevent an escape in consideration of the use of justifiable deadly force.

The exception embodied in both the Model Penal Code and the Crimes Code concerns the use of deadly force in preventing the escape of a person confined in a prison. The Model Penal Code provides that deadly force may be used when the actor believes it is "immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime."⁸¹ No distinction is made between prisoners who have already been convicted and those who are only charged with a crime, or between those convicted of or charged with a felony and those convicted of or charged with a misdemeanor. The Crimes Code provision is similar to the Model Penal Code in that it extends the justification to the guard or peace officer's use of deadly force when he believes such force is

of the arrested person from custody as he would be justified in using if he were arresting such person. (2) A guard or other peace officer is justified in the use of force, including deadly force, which he believes to be necessary to prevent the escape from a correctional institution of a person whom the officer believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense. PA. STAT. ANN. tit. 18, § 508(c) (Supp. 1973).

76. *Commonwealth v. Loughhead*, 218 Pa. 429, 431, 67 A. 747, 748 (1907); *Commonwealth v. LaPorta*, 218 Pa. Super. 1, 8, 272 A.2d 516, 520 (1970); *Geiger v. Madden*, 58 Pa. Super. 616, 622 (1915); *Commonwealth v. Rhoads*, 23 Pa. Super. 512, 516 (1903); *Commonwealth v. Greer*, 20 Pa. C.C. 535, 536 (Pa. C.P. 1898).

77. *Commonwealth v. Micuso*, 273 Pa. 474, 476, 117 A. 211, 212 (1922); *Commonwealth v. Long*, 17 Pa. Super. 641, 643 (1901).

78. *Commonwealth v. Rhoads*, 23 Pa. Super. 512, 516 (1903).

79. MODEL PENAL CODE § 3.07(3) (Proposed Off. Draft, 1962).

80. PA. STAT. ANN. tit. 18, § 508(c) (Supp. 1973).

81. MODEL PENAL CODE § 3.07(3) (Proposed Off. Draft, 1962).

necessary to prevent the escape of a person from a prison.⁸² The Crimes Code provides that the actor is justified in using the deadly force to prevent the escape of a person "whom the officer believes to be lawfully detained in such institution" ⁸³ These provisions of the Crimes Code and Model Penal Code are basically consistent with cases and statutory law in effect before the Crimes Code. As previously stated, at common law a police officer, or in this context a prison guard, is justified in using deadly force to effect the arrest or prevent the escape of a person who has committed a felony.⁸⁴ Pennsylvania statutory law makes prison breach a felony⁸⁵ and therefore provides the grounds for the justification. Since the Crimes Code and Model Penal Code provide that the guard need only reasonably believe that the person upon whom the deadly force was used was a prisoner,⁸⁶ however, it extends the justification to the narrow case where the person killed was reasonably mistaken as a prisoner. Under case law such a mistake would not have been justified because no felony in fact would have been committed.

The Crimes Code further provides that deadly force may justifiably be used when the actor believes that

Such force is necessary to prevent the arrest from being defeated by resistance or escape, and the person to be arrested . . . is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.⁸⁷

The Model Penal Code does not contain this specific provision although it does provide that the deadly force is justified where the actor believes that "there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed."⁸⁸ Within the context of justifiable deadly force to prevent escape, these provisions are not entirely supported by existing Pennsylvania law. The case law is consistent with the

82. PA. STAT. ANN. tit. 18, § 508(c) (2) (Supp. 1973).

83. *Id.*

84. See notes 54-61 and accompanying text *supra*.

85. Any person undergoing imprisonment who breaks prison or escapes, or shall break prison although no escape is actually made, is guilty of prison breach, a *felony*, and, on conviction thereof, shall be sentenced to undergo imprisonment, by separate and solitary confinement at labor, for a term not exceeding ten (10) years. PA. STAT. ANN. tit. 18, § 4309 (1964).

86. PA. STAT. ANN. tit. 18, § 508(c) (2) (Supp. 1973).

87. PA. STAT. ANN. tit. 18, § 508(a) (1) (ii) (Supp. 1973).

88. MODEL PENAL CODE § 3.07(2) (b) (iv) (2) (Proposed Off. Draft, 1962).

provisions in that the force is justified if the person attempting to escape has in fact committed a felony.⁸⁹ Since the Crimes Code provides that the deadly force is justified if the actor *believes* that it is necessary to effect the arrest and the person sought to be arrested possesses a deadly weapon,⁹⁰ and the Model Penal Code provides that the deadly force is justified where the actor *believes* that there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed,⁹¹ the statutes apparently include the attempted escape of a misdemeanor who the actor reasonably but mistakenly believes is carrying such a weapon. In this respect the statutes are inconsistent with existing case law which holds that a policeman may not use deadly force to stop an escaping misdemeanor.⁹²

III. PREVENTION OF THE COMMISSION OF CRIME

A. *Necessity*

Pennsylvania case law provides that under appropriate circumstances either a police officer or an independently acting private person may use deadly force to prevent the commission of a crime.⁹³ The Pennsylvania Supreme Court has said that “[f]or the protection of the weak and unfortunate and the assertion of the duties of humanity reliance must be had on the ancient and settled right to interfere to prevent a felony”⁹⁴ According to the case law, however, before the deadly force is justified the actor must believe that it is necessary.⁹⁵ Although some courts have said that the necessity for the use of the deadly force must be “clear of doubt,”⁹⁶ a reasonable belief is sufficient to sustain the justification.⁹⁷

The Crimes Code adopts the language of the Model Penal Code concerning justifiable force used to prevent a crime.⁹⁸ The statutory language, like the case law, requires that the deadly force must

89. See notes 54-61 and accompanying text *supra*.

90. PA. STAT. ANN. tit. 18, § 508(a) (1) (ii) (Supp. 1973).

91. MODEL PENAL CODE § 3.07(2)(b)(iv)(2) (Proposed Off. Draft, 1962).

92. See note 76 and accompanying text *supra*.

93. *Commonwealth v. Commander*, 436 Pa. 532, 539, 260 A.2d 773, 777 (1968); *Commonwealth v. Lawrence*, 428 Pa. 188, 192, 236 A.2d 768, 771 (1945); *Commonwealth v. Emmons*, 157 Pa. Super. 495, 498, 43 A.2d 568, 569 (1970).

94. *Commonwealth v. Paese*, 220 Pa. 371, 378, 69 A. 891, 894 (1908).

95. *Commonwealth v. Harris*, 444 Pa. 515, 518, 281 A.2d 879, 881 (1971); *Commonwealth v. Russogulo*, 263 Pa. 93, 106, 106 A. 180, 185 (1919); *Commonwealth v. Paese*, 220 Pa. 371, 378, 69 A. 891, 894 (1908).

96. *Commonwealth v. Russogulo*, 263 Pa. 93, 106, 106 A. 180, 185 (1919); *Commonwealth v. Paese*, 220 Pa. 371, 378, 69 A. 891, 894 (1908); *Kilpatrick v. Commonwealth*, 31 Pa. 198 (1858).

97. *Commonwealth v. Harris*, 444 Pa. 515, 518, 281 A.2d 879, 881 (1971); *Commonwealth v. Russogulo*, 263 Pa. 93, 106, 106 A. 180, 185 (1919).

98. (1) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious

be necessary to prevent the crime in order to establish the justification. Specifically the Crimes Code provides that force to prevent a crime is justifiable only when the actor reasonably believes it "immediately necessary" to prevent a person from "committing or consummating the commission of a crime."⁹⁹

B. *Type of Crime*

Existing case law limits the use of deadly force to prevent a crime to only certain felonies.¹⁰⁰ In *Commonwealth v. Emmons*,¹⁰¹ the court held that,

[T]here is no right to kill in order to prevent *any* felony. The taking of human life is justifiable when done for the prevention of any atrocious crime attempted to be committed with force. A homicide is justifiable when committed by necessity and in good faith in order to prevent a felony attempted by *force* or surprise, such as murder, robbery, burglary, arson, rape, sodomy, and the like. Killing to prevent a felony is not justifiable if the felony is a secret one, or *unaccompanied by force*¹⁰²

The case law justification for the use of deadly force to prevent a felony is limited to "atrocious felonies attempted by force or surprise." The courts require that the actor reasonably believe that serious injury will result to himself or another if the attempted

bodily injury upon himself, committing or consummating the commission of a crime involving or threatening bodily injury, damage to or loss of property or a breach of the peace, except that: (i) any limitations imposed by the other provisions of this chapter on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used. (ii) the use of deadly force is not in any event justifiable under the subsection unless: (A) The actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily injury to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or (B) The actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey. PA. STAT. ANN. tit. 18, § 508(d) (Supp. 1973); MODEL PENAL CODE § 3.07(5) (Proposed Off. Draft, 1962).

⁹⁹ PA. STAT. ANN. tit. 18, § 508(d) (Supp. 1973); MODEL PENAL CODE § 3.07(5) (Proposed Off. Draft, 1962).

¹⁰⁰ *Commonwealth v. Harris*, 444 Pa. 515, 518, 281 A.2d 879, 881 (1971); *Commonwealth v. Lawrence*, 428 Pa. 188, 192, 236 A.2d 768, 771 (1968); *Commonwealth v. Emmons*, 157 Pa. Super. 495, 498, 43 A.2d 568, 569 (1945).

¹⁰¹ 157 Pa. Super. 495, 43 A.2d 568 (1945).

¹⁰² *Id.* at 498, 43 A.2d at 569 [court's emphasis].

felony is not prevented.¹⁰³ Because the justification is grounded on a belief that serious bodily harm will result if the crime is not prevented, the elements of the defense are identical to those required to support the homicide as justifiable self defense. This similarity has resulted in cases where the actor has based his defense of justification on both the right to use deadly force to prevent a felony and alternatively on the right of self defense or defense of another.¹⁰⁴ In such cases the courts have given primary emphasis to the rules of self defense in determining the merits of the actor's defense of justification.¹⁰⁵

A further limitation imposed by the courts on the use of deadly force to prevent an atrocious felony attempted by force or surprise is the requirement that the policeman or independently acting private individual must believe that the anticipated death or serious bodily injury to be prevented is "imminent."¹⁰⁶ In *Commonwealth v. Russogulo*¹⁰⁷ the court said that "[t]he general rule of law is a bona fide belief by the defendant that a felony is in process of commission, which can only be averted by the death of the supposed felon, makes the killing excusable homicide."¹⁰⁸ This limitation has been held to defeat the justification defense when the actor used deadly force to subdue a person who previously had attacked another on the ground that the actor believed that the attacker would resume his advances even though he was retiring from his victim at the time the deadly force was used.¹⁰⁹ The requirement that the threatened injury must be imminent also precludes the defense when the deadly force is used to prevent an anticipated future felony. For example in *Commonwealth v. Keith*¹¹⁰ the court refused to sustain the defendant's defense of justification when he set a spring gun to protect against burglars and the mechanism later killed a felon who had broken into defendant's summer home.¹¹¹

103. *Commonwealth v. Capalla*, 322 Pa. 200, 204, 185 A. 203, 205 (1936); *Commonwealth v. Keith*, 46 Berks 137, 140 (Pa. C.P. 1954).

104. *Commonwealth v. Lawrence*, 428 Pa. 188, 192, 236 A.2d 768, 771 (1968); *Commonwealth v. Russogulo*, 263 Pa. 93, 106, 106 A. 180, 185 (1919); *Commonwealth v. Paese*, 220 Pa. 371, 378, 69 A 891, 894 (1908).

105. *Commonwealth v. Lawrence*, 428 Pa. 188, 192, 236 A.2d 768, 771 (1968); *Commonwealth v. Russogulo*, 263 Pa. 93, 106, 106 A. 180, 185 (1919); *Commonwealth v. Paese*, 220 Pa. 371, 378, 69 A. 891, 894 (1908).

106. *Commonwealth v. Russogulo*, 263 Pa. 93, 106, 106 A. 180, 185 (1919); *Commonwealth v. Paese*, 220 Pa. 371, 378, 69 A. 891, 894 (1908).

107. 263 Pa. 93, 106 A.180 (1919).

108. *Id.* at 106, 106 A. at 185. Although a court occasionally will point out the difference between excusable and justifiable homicide, *see, e.g., Commonwealth v. Lawrence*, 428 Pa. 188, 197 and n.1, 236 A.2d 768, 770 and n.1 (1968), the distinction apparently has become largely academic and most cases make no distinction between them. *See BLACK'S LAW DICTIONARY* 867 (4th ed. 1951).

109. *Commonwealth v. Paese*, 220 Pa. 371, 378, 69 A. 891, 892 (1908).

110. 46 Berks Co. 137 (Pa. C.P. 1954).

111. *Id.* at 140.

Although the courts have included felonies which do not necessarily involve the imminent threat of death or serious bodily harm, such as robbery and burglary, in their list of "atrocious felonies attempted by force or surprise"¹¹² which are sufficient to justify deadly force, the opinions in practice have limited the defense to those cases where such felonies were accompanied by the threat of such imminent harm.¹¹³ In *Commonwealth v. Emmons*¹¹⁴ the court said that "[k]illing is justified in protection of property only where an element of danger to the person of the slayer is present."¹¹⁵ Considering the same issue the court in *Commonwealth v. Keith*¹¹⁶ reasoned that deadly force may sometimes be justified in defense of a dwelling or to prevent a felony attempted by force or surprise, such as burglary, but stated that,

these broader statements must . . . be interpreted to apply only to circumstances in which the court's more restricted principle is applicable, namely to burglaries and invasion of dwellings, done or attempted under such circumstances that an element of danger to the person of the slayer is present¹¹⁷

Thus, existing Pennsylvania case law justifies the use of deadly force to prevent a crime only when the actor reasonably believes that the crime will result in death or serious injury to himself or another.

The Crimes Code provides that deadly force is justified when "the actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause a death or serious bodily injury to another unless the commission or the consummation of the crime is prevented"¹¹⁸ This language codifies the case law rule that the justification arises from a threat of harm to the actor or another. Even though the Crimes Code does not refer to the "atrocious felony attempted by force or surprise" discussed in the case law, the standard imposed in the statute is identical with that of the courts. In Pennsylvania a person may not use deadly force to prevent a crime unless he acts on a reasonable belief that death or serious bodily harm will result if the crime is not prevented. The absence in the statute of the

112. *Commonwealth v. Emmons*, 157 Pa. Super. 495, 498, 43 A.2d 568, 569 (1945).

113. *Commonwealth v. Harris*, 444 Pa. 515, 518, 281 A.2d 879, 881 (1971); *Commonwealth v. Keith*, 46 Berks Co. 137, 140 (Pa. C.P. 1954).

114. 157 Pa. Super. 495, 43 A.2d 568 (1945).

115. *Id.* at 498, 43 A.2d at 569.

116. 46 Berks Co. 137 (Pa. C.P. 1954).

117. *Id.* at 140.

118. PA. STAT. ANN. tit. 18, § 508(d)(1)(ii)(A) (Supp. 1973).

case law requirement that the crime must be an atrocious felony does not alter existing law since the real test applied by the courts is whether the actor reasonably believed that death or serious bodily harm would result from his inaction.¹¹⁹ Thus, the Crimes Code standard is the same as that of the case law since the courts in practice have defined "atrocious felony committed by force or surprise" as a crime which the actor believed would result in death or serious bodily harm to himself or another. The case law requirement that the injury to be prevented must be imminent¹²⁰ is embodied in the Crimes Code since it is logically essential to establish the reasonableness of the actor's belief. It is submitted that if the threatened injury was not existing at the time the deadly force was used, or if the crime were already consummated when the force was applied, the Code requirement that the actor reasonably believe that the force was "immediately necessary" to prevent serious harm is not established.

The Crimes Code further provides that deadly force may not be used to prevent a crime unless the policeman or independently acting private individual believes "that the use of such force presents no substantial risk of injury to innocent persons."¹²¹ Since the basis of the justification in both the Crimes Code and existing law is a belief that the deadly force is necessary to prevent harm to the actor or another, this language merely reaffirms the underlying basis of the justification. If the actor may not use the force unless he believes that it is necessary for self defense or defense of another, he logically is not justified in using it when he realizes that its use involves a substantial risk of harm to an innocent person.

The Model Penal Code and Crimes Code provide that, "[a]ny limitation imposed by the other provisions of this chapter on the justifiable use of force in . . . the effectuation of an arrest or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used."¹²² Since the statutes limit the use of deadly force in effecting an arrest or preventing an escape to policemen and their summoned private assistants,¹²³ this restriction also apparently applies to the use of deadly force to prevent a crime. In the context of deadly force used to prevent a crime, however, this limitation is not limited to private persons since both statutes provide the same standard for policemen and independently acting private individuals. Thus, the Model Penal Code and the Crimes Code permit policemen and

119. See notes 112-17 and accompanying text *supra*.

120. See notes 106-111 and accompanying text *supra*.

121. PA. STAT. ANN. tit. 18, § 508(d) (1) (ii) (A) (Supp. 1973).

122. PA. STAT. ANN. tit. 18, § 508(d) (1) (i) (Supp. 1973). The language of the Model Penal Code is identical to that of the Crimes Code on this point.

123. PA. STAT. ANN. tit. 18, § 508(a) (1) (Supp. 1973); MODEL PENAL CODE § 3.07 (2) (b) (ii) (Proposed Off. Draft, 1962).

independently acting private individuals to use force to prevent a crime, but limit the use of deadly force to self defense and defense of another. This is consistent with common law since the courts in practice have limited the defense to only those situations where the deadly force is believed necessary to prevent a crime involving a threat of death or serious bodily injury to the actor or another.¹²⁴

C. *Suppression of a Riot*

It has been observed that "[a] riotous mob is the most dangerous thing on the face of the earth. Of all animals under the sun, men running mad are the worst in their fury."¹²⁵ Perhaps because of the truth of this observation existing case law permits the use of deadly force to suppress a riot whenever the actor believes that such force is necessary to disperse the crowd.¹²⁶ The deadly force may be used by a policeman or his summoned private assistant as well as by an independently acting private individual.¹²⁷ The courts have noted, however, that it would be "more discreet" for the private individual to "be assistant on the justices or sheriff."¹²⁸ The deadly force must be necessary and is justified only when the rioters resist or refuse to surrender.¹²⁹ The basis of the justification is the threatened danger to person and property posed by a riot.

The Crimes Code provision that an actor may use deadly force when he "believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned . . . that such force will be used if they do not obey,"¹³⁰ is a codification of the common law. The deadly force may be used upon a reasonable belief that such force is necessary to subdue the crowd. The requirement that the mob must be ordered to disperse and warned of the intent to use the deadly force is supported by the case law. In *Commonwealth v. Daley*¹³¹ the court held that "no one, whether private citizen or

124. See notes 112-117 and accompanying text *supra*.

125. *Commonwealth v. Scranton*, 7 Luz. L.R. 31, 36 (Pa. C.P. 1878).

126. *Commonwealth v. Hare*, 2 Clark 467, 474 (Pa. 1844); *Commonwealth v. Stewart*, 58 Dauph. 209, 218 (Pa. C.P. 1947); *Commonwealth v. Scranton*, 7 Luz. L.R. 31, 36 (Pa. C.P. 1878).

127. *Id.*

128. *Commonwealth v. Hare*, 2 Clark 467, 473 (Pa. 1844).

129. *Id.* *Commonwealth v. Daley*, 2 Clark 361, 371 (Pa. 1844); *Commonwealth v. Stewart*, 58 Dauph. 209, 218 (Pa. C.P. 1947).

130. PA. STAT. ANN. tit. 18, § 508(d) (1) (ii) (B) (Supp. 1973).

131. 2 Clark 361 (Pa. 1844).

public officer, would have been authorized to fire upon [the rioting group] until other means were resorted to for its dispersion, and necessities arose from the manner and extent of the resistance to such means, demanding extremities."¹³²

The common law and Crimes Code rule that deadly force may be used to suppress a riot is consistent with the rules concerning the justifiable use of deadly force to prevent a crime. In Pennsylvania riotous destruction of property is a felony¹³³ and a group of people engaged in a riot logically is sufficient to sustain a reasonable belief that an "atrocious felony attempted by force" which involves a threat of death or serious bodily harm will result if the riot is not immediately suppressed.¹³⁴ Similarly, the Crimes Code requirement that "the actor believe that there is a substantial risk that the person [crowd] he seeks to prevent from committing a crime [riotous destruction of property] will cause death or serious bodily injury to another unless the commission or the consummation of the crime is prevented,"¹³⁵ is met when deadly force is used to suppress a riot.

Although essentially a codification of existing Pennsylvania case law, the statutory language restricts the common law justification defense in one respect. Since the rules concerning the use of force to suppress a riot are embodied in the statutory section dealing with prevention of crime,¹³⁶ the restriction that the use of deadly force is limited to policemen and their summoned assistants¹³⁷ is applicable. Under the Crimes Code an independently acting private person may use force to suppress a riot, but he must stop short of deadly force unless he acts in self defense or defense of another. The practical significance of this limitation is minimal, however, since a riotous crowd would seem sufficient to justify a reasonable belief that a serious threat of death or bodily harm to the actor or another is present and therefore would justify the deadly force as an act of self defense.

CONCLUSION

The Crimes Code provisions concerning the justifiable use of deadly force in effecting an arrest are basically consistent with

132. *Id.* at 371.

133. Whoever, while participating in a riotous and tumultuous assembly, unlawfully, and with force, demolishes or pulls down or destroys, or begins to demolish, pull down or destroy any public or private building or any machinery, whether fixed or movable, is guilty of a *felony*, and upon conviction thereof, shall be sentenced to pay a fine not exceeding two thousand (\$2000), or to undergo imprisonment, by separate or solitary confinement at labor or by simple imprisonment, not exceeding five (5) years, or both. PA. STAT. ANN. tit. 18, § 4402 (1964).

134. See notes 100-03 and accompanying text *supra*.

135. PA. STAT. ANN. tit. 18, § 508(d)(1)(ii)(A) (Supp. 1973).

136. PA. STAT. ANN. tit. 18, § 508(d) (Supp. 1973).

137. See notes 122-24 and accompanying text *supra*.

existing law so far as concerns the elements of necessity, fresh pursuit and notice. The Code's treatment of the type of felony required to support the justification and the judicial standard used to measure the justification of the force, however, are significantly different from the case law rules. The Crimes Code, like the Model Penal Code, limits the use of deadly force to only certain felonies, but unlike the Model Penal Code does not define the type felony intended to support the justification. The extent of deviation from the common law rule that any felony will support the deadly force is dependent upon how the courts define the term forcible felony as used in the Crimes Code. The Crimes Code provision which replaces the existing in fact standard with a reasonable belief standard extends the scope of the justification defense. Because the Crimes Code limits the use of deadly force in effecting an arrest to policemen and their summoned private assistants, however, it also restricts the defense when the actor is an independently acting private individual. This exclusion of private persons is desirable in light of the replacement of the common law in fact standard with the reasonable belief standard of the Crimes Code.

The new reasonable belief standard also alters existing law concerning the justifiable use of deadly force to prevent an escape. The case law standard that the escaping criminal must have in fact committed a felony is replaced by the Crimes Code test of reasonable belief. With minor exceptions the Crimes Code and Model Penal Code embody the existing rule that deadly force is justified in preventing an escape only when it would have been justified in effecting the arrest.

In the use of deadly force to prevent a crime the Crimes Code adopts the language of the Model Penal Code and essentially codifies existing law. Neither the statutes nor the cases differentiate between policemen or independently acting private individuals in the use of deadly force to prevent a crime. Both the statutes and case law require that the actor must believe that the deadly force is necessary to prevent a crime which involves an imminent threat of death or serious bodily harm to the actor or another. Since the underlying basis for the justifiable use of deadly force to prevent a crime is the prevention of death or serious bodily harm to the actor or another, the justification is not applicable where the use of such force presents a substantial risk of injury to an innocent person.

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